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90-743

CASE NO. _____

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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OCTOBER 1990

EDITH ROBINSON,

Plaintiff-Appellant,

v.

U. S. POSTMASTER, ANTHONY M. FRANK; UNITED STATES POSTAL SERVICE; and the NATIONAL RURAL LETTER CARRIERS' ASSOC.,

Defendants-Appellees

PETITION FOR WRIT OF CERTIORARI
to the UNITED STATES COURT OF APPEAL
for the ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
for PLAINTIFF-APPELLANT

Edith Robinson
Plaintiff-Appellant
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QUESTIONS PRESENTED FOR REVIEW

1. Did U.S. v. Fausto, 108 S. Ct. 668, concerning an excepted service, non-preference employee, repeal the competitive status of hundreds of thousands of non-preference U. S. Postal Service employees? Plaintiff-appellant was a competitive service, non-preference employee who was summarily discharged without any procedural safeguards provided by the collective bargaining agreement or statutes.

2. Does the "arguably justified" standard in Consolidated Rail v. Railway Labor Exec. Ass'n, 109 S. Ct. 2477 (1989), under the Railway Labor Act, apply by parol to labor-management relations under the National Labor Relations Act? Four circuits have so ruled, but the 11th did not. Plaintiff-appellant's reassignment was "arguably justified," but her summary discharge without due process was not.

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10-CB-5202(P)National Rural Letter Carriers' Assoc. (Union)

10-CA-23663(P) U.S.P.S.
10-CB-5258(P) NRLCA (Union)

U. S. District Court (M.D.Ala.N.D.)
Case No. 89-T-1388-N (dismissed because Judge in instant case did not dismiss Frank, U.S.P.M.G. as improper defendant in instant case although defendant U.S. Postal Service asked him to several times. Case 89-T-1388-N was a Title VII case, and was dismissed on the basis of res judicata, since Frank had already been named in the instant case as a defendant.)

Texas Employment Commission

Tribunal No. 88 04728 2 0189, awarded compensation to plaintiff-appellant

Appeal No. 88 01844 20 020889, reversed on grounds that plaintiff-appellant had been paid annual leave for the five days she worked in Alabama, in spite of the records showing her pay came from Alabama, not as annual leave from her former job in Texas.

GROUNDS FOR U.S. SUPREME COURT JURISDICTION

United States Court of Appeals for the Eleventh Circuit, Case No. 89-7782, D.C. Docket No. 88-H-977-N, Judgment rendered June 13, 1990. Petition for Rehearing and Suggestion(s) of Rehearing En Banc denied August 14, 1990.

The statutory provision believed to confer on the Supreme Court of the United States jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C.S. 1254(1), and the Fifth Amendment to the Constitution, the takings clause and procedure clause.

CONSTITUTIONAL PROVISIONS, STATUTES, and REGULATIONS

Constitutional Amendment Five

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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5 U.S.C.S. sec. 301, 7121(e)(2), 7501 et. seq., 7701(c)(1)(2),

39 U.S.C.S. 1001(b), 1005(a)(4)(A)(ii), 1005(a)(1), 1007, 1203, 1206, 1207.

Exec. Order 9397, Pub Law 100-90, S.Rep. 95-969

STATEMENT OF THE CASE

Plaintiff-appellant, Edith Robinson (Robinson) was hired from a competitive exam register by the U.S. Postal Service on January 26, 1980. Defendants have conceded that Robinson had a property interest in her job; they have denied that that interest existed at Autaugaville, Alabama, claiming that her appointment there was improper and, therefore, summarily voidable. Robinson was appointed by reassignment under a collective bargaining agreement (CBA) provision allowing retreat to a former duty station. Retreat rights are found at Art. 12, 4, D. Defendants have conceded that Postmaster Hand had delegated authority to effect Robinson's appointment, but, have contended that he had to do so within the intended, rather than literal, provisions of the CBA.

In sustaining the District Court's grant of summary judgement to the defendants, the 11th Circuit Court of Appeal

supported its judgment, on page 3, by deleting a key phrase under CBA Art. 12, 2, C, 4, and writing, as follows: "4. Whenever a rural carrier voluntarily transfers to a rural carrier position in another post office, ... (deleted)... such carrier begins a new period of seniority in the new office. Such employee has no retreat rights or seniority protection.. .." The key phrase omitted, in context, is: "... position in another post office, <u>such as a mutual exchange or as the result of applying for a rural carrier vacancy</u>, such carrier...." In appointing Robinson, Postmaster Hand interpreted that phrase literally. Since Robinson's transfer away from his office in 1985 <u>resulted</u> in an involuntary transfer when the route she was promised was withdrawn after she entered duty, Hand granted Robinson retreat rights, in harmony with CBA 12, 2, C, 1, which states: "A rural carrier who is involuntarily reassigned to a rural

carrier position at another post office retains seniority for bidding on existing vacancies and on future vacancies."

The District Court and 11th Circuit Court has not acknowledged Robinson's statutory rights. Defendants claimed that Robinson was in the excepted service and not due statutory protections. However, Robinson was in the competitive service. She had served a couple of months in the excepted service, but was converted to career/competitive status, her Form 50 shows, on February 21, 1981. The courts have acknowledged only contractual rights, notwithstanding the CBA provision, Art. 12, 2, which states:"Rural Carrier Seniority. In addition to the provisions listed below, rural carriers are covered by the seniority provisions in Section 1007 of the Postal Reorganization Act, which are intended to prevail." That seniority provision is found under 39 U.S.C.S. 1007, which states: "Subject to agreements made under chapter 12 of this title, the

seniority of an employee of the Postal Service occupying a position whose regular duty involves the collection and delivery of mail on a rural route shall be preserved. Seniority for such employee shall commence on the first day of his service in such a position, or, in the event such an employee transfers to another such position, on the day he enters duty in the other position."

Robinson was hired at Autaugaville, Alabama Post Office on March 23, 1988. It is undisputed that Postmaster Hand committed his last official act when he requested a Form 50 be processed reflecting Robinson's assignment there, effective March 23, 1988. On March 28, 1988, Hand was instructed by higher level management to summarily discharge Robinson. Robinson's discharge was executed without advance notice, without written reasons, and without notification of her appeal rights. To the contrary, when Robinson presented a Step 1 grievance

on April 6, 1988, Postmaster Hand gave Robinson the written statement, "Dear Mrs. Robinson, Your grievance of April 6 cannot be resolved when actually you are not an employee of this office. Max Hand, postmaster." (Hand dep. exh. 9) The Union refused to represent Robinson in getting her grievance accepted for processing to a resolution in Alabama. Such refusal to allow Robinson to grieve her discharge at Autaugaville, Alabama was "harmful error."

Next, to "cure" the harmful error, above, and to get Robinson discharged for "just cause and with due process," Robinson's former postmaster in Texas, Mary McLean, charged Robinson as AWOL. Robinson grieved the charge on May 24, 1988, but Ms. McLean denied the grievance because she could not sustain it. The Texas State Union Steward, Lewis Boggan, took the grievance to Step 2 B at the Houston, Texas management sectional center (MSC).

Mr. Boggan wrote on the Step 2 A form that Robinson was hired by the Alabama postmaster and that corrective action requested was to reinstate her at Autaugaville, Alabama Post Office. The MSC management representative, E. Wallace, denied the grievance, on the same grounds as Ms. McLean had, writing: "This grievance is denied.... The Houston Division possesses no authority in regards to the Alabama post offices." Again, this was "harmful error." CBA Art. 15, 1 states: "Grievances ... are to be processed and adjudicated based on the principle of resolving such grievances at the lowest possible level in an expeditious manner. ... The parties further agree that at any step in the grievance procedure, the Union representative shall have full authority to settle or withdraw the grievance in whole or in part. The Employer, likewise, shall have full authority to grant, settle or deny the grievance in

whole or in part." The grievance had to go to Step 2 B, at the Regional level, in Memphis, Tennessee before any managers had authority over Montgomery, Alabama managers, in order to grant the grievance. This second grievance was executed with harmful error, also. Robinson was discharged at Alabama and then Texas by managers who had higher level managers ordering them not to grant the grievance, or who did not have the authority to grant the grievance. Neither postmasters, Hand or McLean, wanted to discharge Robinson. Both had written her excellent evaluations.

Harmful error is error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one it reached. See Cornelius v. Nutt, 105 S.Ct. 2882, 2890; and Smith v. United States Postal Service, 789 F.2d 1540 (Fed.Cir.1986). 39 U.S.C.S. 1001(b) states that: "The

Postal Service shall establish procedures ... to assure its officers and employees full protection of their employment rights by guaranteeing them an opportunity for a fair hearing on adverse actions,..." 39 U.S.C.S. 1005(a)(1) applies the provisions of Chapter 75 of Title 5 to Postal Service employees.

Before United States v. Fausto,108 S.Ct.668, 98 L.Ed.2d 830(1988), preference and non-preference Postal Service employees had the statutory protection of the procedural safeguards under 5 U. S.C.S. 7501 et. seq. In Stalkfleet v. U.S. Postal Service, 6 M.S.P.R. 637 (1981), the MSPB ruled that, "... An agency may take an action against any employee, veteran or non-veteran, covered under 5 U.S.C. Ch. 75, subch. II, 'only for such cause as will promote the efficiency of the service.' 5 U.S.C. 7513 (a). See S. Rep. No. 95-969, 95th Cong., 2d Sess. 48-51 (1978), U.S. Code Cong.

& Admin. News 1978, p. 2723. In other words, non-veteran employees, who were not able to get MSPB review, had the grievance-arbitration procedures to give them the protections stated in 5 U.S.C. 7501 et. seq. In 1985, the U. S. Supreme Court, in Cornelius v. Nutt, 105 S. Ct. 2882 at 2885, ruled that the arbitrator shall be governed by section 7701(c)(1) and (2), and 7121(e)(2), including the "harmful-error" rule. In Travaglini v. Dept. of Educ., 23 M.S.P.R. 417 (1984), the MSPB ruled that an appointment obtained through material misrepresentation can not be voided without adverse action procedures, provided an employee is covered by 5 U.S.C. 7513, or else "harmful error" is committed, which calls for the reversal of the action and reinstatement of the employee.

After United States v. Fausto, supra, several circuit courts of appeal have ruled that a non-preference or non-

veteran employee, by virtue of not having MSPB review, is not entitled to the protections of 5 U.S.C.S 7513. However, Fausto, supra, dealt with an excepted service employee who did not have the statutory protections of 5 U.S.C. 7513 anyway, at any time. Plaintiff-appellant Robinson believes this application of Fausto is an error in deductive reasoning, and will have significant impact on hundreds of thousands of Postal Service, competitive service employees, by taking away their statutory protections. Five of the cases, holding that non-veteran employees had no statutory rights to judicial review, were Witzkoske v. U. S. Postal Service, 848 F.2d 70 (6th Cir. 1988); Diaz v. U.S. Postal Service, 853 F.2d 5 (1st Cir. 1988); Yokum v. Postal Service, 4 IER Cases 1661 (4th Cir.1989); Parker v U.S. Postal Service, 859 F.2d 922 (6th Cir. 1988) (unpublished): and Royals v. Tisch, 864 F.2d 1565 (11th Cir. 1989). The four published cases

dealt with three postmasters and one branch manager who worked directly under an MSC postmaster. These employees were not protected by 5 U.S.C. 7513, until 1987 when Congress made the provisions applicable to supervisory and management employees of the Postal Service and to Postal Service employees "engaged in personnel work in other than a purely nonconfidential clerical capacity. See Pub. L. No. 100-90, 101 Stat 673 (codified at 39 U.S.C. 1005(a)(4)(A)(ii). The amendment was not applicable to actions begun after September 16, 1987. See Publ L. No. 100-90, 1(b)(2). Up until this amendment, bargaining unit employees, such as Robinson, who were hired from a competitive exam register, and who were converted to career/competitive status, were entitled to statutory protections. Many postmasters and managers were veterans who were hired, with and without competitive exams when political

appointments were sometimes made. Of these postmasters and managers, some were veterans, thereby having statutory protections. What evolved was that some postmasters, non-veterans, were excluded from statutory protections, while many of their peers and all bargaining unit employees were not excluded. This lead to disparity in treatment and protection. Hence, the 1987 amendment to include all postmasters and managers. To reiterate, bargaining unit employees, by being competitive servants, were entitled to the standards set by 5 U.S.C. 7501 et seq., even though they were non-veterans and did not get MSPB review. Their statutory protections came about by the arbitrator's being bound by the same standards as the MSPB, thereby yielding uniformity in personnel decisions, which was the Supreme Court's stated goal in

Cornelius v. Nutt, 105 S. Ct. 2882. However, following the Fausto decision concerning an excepted, non-veteran, the circuit courts have held that the Supreme Court and Congress excluded competitive postal employees by virtue of their being non-veterans. Most disturbing is a footnote in Royals v. Tisch, 864 F.2d 1565, at 1566, footnote 2. The 11th Circuit stated that, "Because all Postal Service positions are in the postal career service, 'see' 39 U.S.C. 1001(b), Postal Service employes are part of the excepted service for purposes of the CSRA." Postal handbook, Payroll Processing, 224.221 defines career as: "A career appointment is an appointment to an authorized career position, without time limitation, requiring the completion of a probationary period. Included are: a. ... and regular rural carriers." Defendant U. S. Postal Service have contended that Postmaster Hand hired Robinson on a

temporary basis. This "temporary hiring" would have placed Robinson outside the statutory provision because temporary, competitive employees are excluded, 5 U.S.C. 7511(a)(1). However, postal manual, Employee and Labor Relations Manual (ELM), sec. 323.411 defines a temporary appointment as: "Definition. Temporary Appointment is a noncareer limited appointment up to, but not exceeding, 1 year in a position requiring the performance of duties assigned to nonbargaining unit position." Robinson was a bargaining unit, career employee. During Robinson's approximately eight years of service, she carried an SF 46, U.S. Government Motor Vehicle Operator's Identification Card. The card was issued to her pursuant to Public Law 93-579 (The Privacy Act of 1974) under U.S. Code 5, section 301. Solicitation of Robinson's social security number by the United States Civil Ser-

vice Commission (now Office of Personnel Management, OPM) was authorized under provisions of Executive Order 9397, dated Nov. 22, 1943. SF 46 was revised in Jan. 1977, USCSC, and is found under Federal Personnel Manual (FPM) Chapter 930.

In the instant suit, notwithstanding the contractual or CBA provision of seniority protections under Art. 12, 2 relating to 39 U.S.C.S. 1007, the lower courts failed to recognize Robinson's statutory protections of the standards set forth in 5 U.S.C.S. 7501 et. seq. Instead, the lower courts ruled on the "merits" of Robinson's grievance for discharge at Autaugaville, Alabama Post Office. The 11th Circuit deleted a key phrase in the CBA provision relating to Robinson's seniority and retreat rights provisions, to circumvent the actual language of the CBA. In CBA Art. 37, Scope of Agreement, the parties agreed that, "This agreement constitutes the sole and entire existing agree-

ment between the parties and completely and correctly expresses all of the rights and obligations of the parties. The parties acknowledge that each had the opportunity to make demands and proposals with respect to all collective bargaining subjects. Each party agrees that for the life of this Agreement the other party shall not be obligated to bargain with respect to any subject not covered in this Agreement." If the CBA "completely and correctly" expressed all the rights and obligations of the parties, Postmaster Hand and plaintiff-appellant, Robinson, should have been able to rely on the written word of the CBA, not upon the "intent" with key phrases deleted.

Concerning the "merit" of Robinson's grievance for discharge, the U. S. Supreme Court, in United Paperworkers Intern. Union v. Misco, Inc, 108 S. Ct. 364 (1987) at n. 2, p. 370, ruled that, "'The courts, therefore, have no business

weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim.' Steelworkers v. American Mfg. Co., 363 U.S. 564, 567-568, 80 S.Ct. 1343, 1346, 4 L.Ed.2d 1403 (1960).... 'see also' AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649-650, 106 S.Ct. 1415, 1418-1419, 89 L.Ed. 648 (1986)"

Plaintiff-appellant Robinson contends that, in the absence of an arbitrator's ruling due to the Union's failure to represent (discussed below), the courts should be obligated to adhere to the same standards to which the arbitrator would have been obliged, i.e., 5 U.S.C.S. 7501 et. seq. Plaintiff-appellant, Robinson, contends that even in the absence of such standard of statutory protections, and only considering CBA protections, the lower courts did not grant Robinson the

CBA seniority protection found under Art 12, 2, relating to 39 U.S.C.S. 1207, of seniority commencing on the first day of duty following a transfer to a new office.

As stated above, the Union did not take Robinson's grievance to Step 2 A. The national Director of Labor Relations, Steve Smith, told the Alabama Steward, Donnie Pitts, who thought Robinson's grievance was meritorious, not to process Robinson's grievance. (Smith dep. p. 56) Mr. Smith's order was contrary to Robinson's rights under the CBA, Art. 15, 1 because, "(T)he parties further agree that at any step in the grievance procedure, the Union representative shall have full authority to settle or withdraw the grievance in whole or in part." Mr. Smith's order allowed Mr. Pitts only to withdraw, not settle.

In Sullivan v. Department of Navy, 720 F. 2d 1266 (1983), the Federal Cir-

cuit Court of Appeals stated that, "It is difficult to imagine a more serious incursion on fairness than to permit the representative of one of the parties to privately communicate his recommendations to the decision makers. To allow such activity would be to render the hearing virtually meaningless. We are of the opinion that due process forbids it. 'See' Vitarelli v. Seaton,359 U.S. 535, 79 S.Ct. 968, 3 L.Ed.2d 1012, supra;... Service v. Dulles, 354 U.S. 363, 77 S.Ct. 1152, 1 L. Ed.2d 1403, supra, 375 F.2d at 780-781." Before Robinson's grievance of April 6, 1988 was denied, Postal management in Memphis, Tennessee and Postal attorney, Tom Pigford, consulted with Union representative, Smith, and Union attorney, William Peer (counsel of record). The decision was evidently made to "cure" the harmful error in the Alabama grievance by means of the second, or Texas, grievance, but the second grievance inherently

constituted harmful error because Texas postal managers could not grant the relief sought, i.e. reinstatement. The proper place to grieve an Alabama firing is in Alabama, obviously, in spite of Postmaster Hand's written statement that Robinson's grievance could not be resolved because she was not an employee at Autaugaville, Alabama.

Mr. Smith had animosity toward Robinson because she disapproved of the Union's helping a former Alabama State Union Officer (longtime Secretary and briefly, President) to retreat from Texas to his original route in Alabama, despite his previous transfer away having been intitiated and resulting in a voluntary transfer, i.e. he was awarded the route which he was promised in Texas, but simply regretted his decision to leave Alabama. The Union promised that if management allowed such retreat, and if any employees

grieved the retreat, the Union would not process their grievances. Such power to show disparity in treatment between employees, despite CBA Art. 2 concerning non-discrimination (EEO) and civil rights, will most certainly go unfettered if bargaining unit, competititve employees are deprived of their statutory procedural safequards under 5 U.S.C.S. 7501 et. seq. If a grievance does not reach arbitration, to gain judicial review, the employee's only recourse is through a breach of contract suit, which is very hard to prove because the Union can claim ignorance or unintentional error. (Smith dep. p. 69, retreat provided for former Al. Union officer).

Mr. Smith and union attorney, William (Bill) Peer, knew that Robinson's discharge at Autaugaville, Alabama on instructions of MSC managers, Paula Steadham, Dir. of Labor Relations/Human Resorces, and Buzz Geohagen, Dir. of Field Opera-

tions, was violative of Robinson's due process rights. In the arbitration case of Helen G. James, before Harold D. Jones, Jr., arbitrator, case no. S7R-3A-D-22443, and case no. S7R-3A-C-22435, Union attorney, Mr. Peer, so argued. He stated, in this December 4, 1989 case involving a postmaster's having been instructed to discharge by MSC managers not in direct chain of command over the postmaster, that, "The Postmaster committed a Freudian slip and referred to these labor relations people as 'his superiors.' Of course, they are not. Numerous arbitrators have described their proper function, as line-staff officials who render technical advice on proper procedures. They must not dictate the decision, which patently happened here. The Postmaster was simply acting out what he was told to do by his 'superiors,' in good-soldier fashion. He took no independent action, the decision was not his and his authority

was usurped by the Dallas MSC," p. 2. Such is what happened in Robinson's instant case. Postmaster Hand was instructed to discharge Robinson by the same line-staff officers, and Mr. Hand obeyed, losing his delegated authority. Postmaster Hand gave an affidavit to the NLRB that he was threatened by the managers that since he had hired Robinson "illegally," he might lose his retirement check. Therefore, he signed their statement that he had hired Robinson only "temporarily" to make her fall outside the statutory provision for competitive, time-unlimited employees, in spite of the fact that the ELM manual states that temporary positions are filled only with nonbargaining unit employees, and in spite of the fact that Hand's acceptance letter of Robinson's request to retreat refers to a future employment there, at the end of the present "guarantee period," November, 1988.

The defendants, U.S. Postal Service and National Rural Letter Carriers' Association have not claimed or charged fraud against Robinson in her requesting retreat rights. They have not charged Robinson with immorality, by the statutes pertaining to federal employees. They have, however, bandied about the suggestion or idea that Robinson was appointed by Hand in order for them to continue their longtime affair that commenced the first time Robinson was employed at Autaugaville. The greatest unofficial charge has been that Robinson caused Mrs. Hand much emotional suffering concerning the "affair." U.S. Postal Service EEO officer, Joseph Hopkins, claimed that Mrs. Hand was only jealous of Robinson, for the "kind of woman she is," rather than being jealous of Robinson, for being female. Mr. Hopkins needs to know that, according to Mrs. Hand, Mr. Hand fathered two dau-

ghters by his former clerk. Robinson can safely say that Mr. Hand, an older, slow-talking, laid-back, country gentleman, would have given his favorite hunting dog and a plug of his favorite chewing tobacco to have known, Biblically speaking, what his wife thought she knew, intellectually speaking, about the conception of the clerk's two daughters. However, he did not. Neither did he and plaintiff-appellant have an affair.

Causing a postal manager's wife great emotional distress has not adversely affected a female employee's professional life, in the past. On the contrary. MSC Dir. Labor Rel./Human Resources, Paula Steadham, who ordered Robinson's discharge at Autaugaville, testified at her deposition that she divorced her first husband, Wayne Pilgreen, in " '73, I think." Next, she married Bayne Petrey, Dir. of Labor Relations, in "'75." Montgomery County, Alabama Court House records show that Mr.

and Mrs. Petry moved from Dothan, Al. to Montgomery, Alabama in May, 1974. On June 7, 1974, Mr. and Mrs. Wayne (Paula) Pilgreen separated, with his moving out of the home. On or near November 7, 1974, the Pilgreens divorced. On November 5, 1974, Mr. Petrey separated from Mrs. Petrey, she filed for divorce on November 6, 1974, and they were divorced on Nov. 7, 1974. Sometime thereafter, in 1975, Paula Pilgreen married Bayne Petrey, the marriage lasting 3 months. (Steadham dep. p. 8) Sometime later, Paula Petrey married Mr. Steadham, to whom she is currently married. To chronicle the life of the first Mrs. Petrey, and to see the great emotional distress that both she and her children suffered, the Court records show that different ones of the four children lived with one and then the other parent until grown. At one time, Petrey petitioned the Court for custody of the daughter, citing the

mother as too emotionally distraught to properly care for the daughter, and referring to emotional trauma the children had experienced. Just as Mrs. Steadham did not tell the truth at her deposition concerning her marriage to Mr. Petry, she has not told the truth concerning Robinson's "bad attitude," etc. Ms. Steadham recalls a meeting in which Robinson asked her and Mr. Geohagen to give their answers in writing, but she neglects to mention that Robinson had telephoned her a few days prior to that meeting, asking her very nicely for her help. It was after it became evident to Robinson that Ms. Steadham did not intend to help her that Robinson asked for answers in writing, for documentation. Ms. Steadham went to work for the Postal Service in 1973. After divorcing her husband

in 1974 and marrying Mr. Petrey in 1975, she was promoted to a job directly below Mr. Petrey's as Dir. Labor Relations, and then Ms. Steadham simply moved up, with attrition. She holds a high position for a woman with only 40 hours of college credit. She is not known for kindness, but for wielding her power. Robinson's two postmasters who discharged her, Hand and McLean, did not want to do so. They considered Robinson to be a good worker and to have a helping attitude and personality, and knew her well enough to know her faults and like her in spite of them. And the Union officer who has been credited with slandering Robinson, Mr. J.W. McCullough, has not had much to complain about either. His wife is the postmaster, he was the rural carrier (retired now) and his daughter-in-law is the clerk, at the small post office in Jones, Alabama.

For all the reasons of animosity

shown above, Robinson was railroaded out of her job with the U.S. Postal Service, with no representation from the Union, although the Union clearly understood (and helped plan) Robinson's denial of due process. Robinson's case should be ample proof that competitive, non-veteran Postal employees need the statutory protections of 5 U.S.C.S. 7501 et. seq.

Robinson has still shown that, absent statutory protections, her CBA protections to due process were violated. CBA Art. 16, sec. 1 states: " .... Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay."

Postmaster Hand's hiring of Robinson met the written word of the CBA, and was "arguably justified," accord-

ing to the standard set in Consolidated Rail v. Railway Labor Exec. Ass'n, 109 S.Ct. 2477 (1989) and should have stood until an arbitrator's decision ruled otherwise, if parol applies, as presented to the Supreme Court in, "Questions Presented for Review." The U.S. Postal Service provides for grievance-arbitration under 39 U.S.C. 1203, 1206 & 1207.

District Court jurisdiction in this case is found under 39 U.S.C. 1208 (b), 1209, and 409 (for back pay), and Sec. 301 of the Labor Management Relations Act, 29 U.S.C. Section 185.

Respectfully submitted,

Edith N. Robinson

Edith Robinson
Counsel of Record, Pro Se
Plaintiff-Appellant

355 Bedford Terrace
Prattville, Alabama 36067

(205) 361-1714

Footnote: Robinson is 42 years old, has been married to the same man for 26 years, has 3 children, ages 24-19, has a B.S. degree and postgraduate studies, seeks reinstatement to end litigation and for justice to prevail. (back pay with interest)

 attorneys fees, expenses, to be made whole.

REASONS FOR ALLOW. OF WRIT

1. Several Circuit Courts of Appeal have possibly decided a federal question of statutory protections for competitive, non-veteran employees that is in conflict with earlier Supreme Court decisions to obtain uniformity of standards in decisions concerning personnel actions. After, United States v. Fausto, 108 S.Ct. 668, circuit courts are ruling that non-veteran Postal employees are in the excepted service, for purposes of the CSRA, affording bargaining employees only collective bargaining rights as protected by their unions, with no right of judicial review if there is no arbitration decision for judicial review. These circuit court decisions leave doubt as to whether arbitrators are bound by the same standards as the MSPB, for purposes of the CSRA.
2. The 11th Circuit ruled in conflict with

other Circuit rulings that decisions under the Railway Labor Act apply by parol to decisions under the National Labor Relations Act. The Supreme Court decision in Consolidated Rail v. Railway Labor Exec. Ass'n, 109 S.Ct. 2477 was that if management exercises its rights in a "arguably justified" way, it is up to an arbitration decision to decide otherwise as to correctness.

3. Summary judgment in the instant case was improper because plaintiff-appellant raised several genuine issues of material fact:

1. MSC managers did not have delegated authority to discharge.
2. Plaintiff-appellant's discharge was for discriminatory reasons, thereby being a "mixed case."
3. Defendant U.S.Postal Service was granted summary judgment on the basis of Ms. Paula Steadham's affidavit, with not one supporting document.

4, Plaintiff-appellant did not get due process protections because Postmaster Hand did not inform Plaintiff-appellant of her appeal rights, refused to accept her grievance for processing to any resolution when she presented her grievance, and he did not have authority to grant her grievance because higher-level managers ordered him not to.

5. The State Union officer should have had authority (as provided by CBA Art. 15, 1) to settle plaintiff-appellant's grievance, but the national Union Director of Labor Relations, Steve Smith, told the State Union officer, Donnie Pitts, not to process the grievance even though Pitts thought it was meritorious.

No. 89-7782 June 13,1990
11th Circuit Court of Appeals Judgment

(unpublished) "Edith Robinson, represented by an attorney, brought this action claiming that defendant United States Postal Service (USPS) breached the collective bargaining agreement entered into with defendant National Rural Letter Carriers Association (Union) by refusing to honor her retreat rights and wrongfully removing her from the position of rural letter carrier in Autauga County, Alabama. She further claimed the Union breached its duty of fair representation by refusing to process her grievance beyond the first level of the grievance procedure, and that such refusal was made in bad faith by Union officials. Robinson also named as a defendant Alabama Rural Letter Carriers' Association, however, the district court later dismissed them as a party in this

suit and that ruling has not been appealed.

Article 12 of the collective bargain-agreement provides the governing principles of seniority, posting, and reassignment under the agreement. Article 12.4-D specifically sets forth retreat rights and states:

1. A reassigned rural carrier may exercise rights when a vacancy occurs at the original office or in any office to which territory form the original office was transferred...

2. A rural carrier who was involuntarily reassigned to another craft in the carrier's office, for any reason, must be returned to the first rural carrier vacancy which occurs at that post office...

Article 12.4-A defines reassignment to include a transfer of excess employees, conversion to city delivery, and consolidation. Article 12.2 C-4 states:

4. Whenever a rural carrier voluntarily transfers to a rural carrier posi-

in another post office,... such carrier begins a new period of seniority in the new office. Such employee has no retreat rights or seniority protection...

The undisputed facts are as follows. Robinson was employed as a rural letter carrier at the Autaugaville Post Office in Alabama until she voluntarily initiated a transfer to a specific route in Texas. Several years later, Robinson, desiring to return to Autaugaville, inquired of the Union Director of Labor Relations, Steve Smith, whether she could exercise "retreat rights" to return to that post office. Smith told Robinson that he did not think she had any retreat rights because she voluntarily left her route in Alabama. He stated that he did not think she could win a grievance to claim retreat rights

and Robinson indicated that she may try to pursue her transfer back to Alabama anyway.

Upon being informed that the Autaugaville position was available, Robinson travelled to Autaugaville and discussed the vacancy with the postmaster, Max Hand. Robinson requested that she be allowed to exercise her retreat rights to that position. Mr. Hand accepted Robinson's request and permitted her to begin work on the subject route. Hand requested the local management to issue a personnel form to reflect Robinson's new assignment. The management directors called a meeting with Hand and informed him that Robinson had no retreat rights under the collective bargaining agreement and that Hand's action in hiring Robinson was a violation of the agreement. They also advised him that the position had to be posted as required by the agreement and that all transfers

must be sapproved by them. They directed Hand to discontinue Robinson's employment at the Autaugaville Post Office.

Robinson filed a Step 1 grievance with Hand and requested that her retreat rights be honored. Hand denied the request. The Union did not pursue the grievance. Meanwhile, the postmaster in Texas where Robinson was still employed directed her to return for duty. Robinson failed to report to Texas and she was sent a notice of removal for being Awol. Robinson filed a grievance concerning her removal from the Texas post. The Union processed the grievance and worked out a settlement with the USPS that Robinson's removal notice would be cancelled if Robinson agreed to return to Texas by a specific date. Robinson did not report to work.

The USPS moved for summary judgment

on the basis that it did not violate the bargaining agreement, that Hand did not have the authority to hire an employee in violation of the agreement, and that Robinson's removal form the Autaugaville route was appropriate since she was not legally assigned to that route. The Union filed a motion for summary judgment on the basis that it had a good faith reason for not pursuing Robinson's grievance, in that, it did not believe that she had retreat rights under the terms of the agreement.

Proceeding pro se, Robinson filed a motion for summary judgment including her affidavit and other exhibits. The district court granted the defendants' motions for summary judgment finding that Robinson failed to produce any evidence that indicated that the Union's interpretation of her rights under the agreement was made in bad faith. The district court found that since Robinson

did not prove a breach of the Union's duty of fair representation, she could not maintain an action discharge in violation of the agreement against USPS. The district court further found that Robinson did not have retreat rights to exercise under the terms of the agreement, and thus, USPS did not violate the agreement by removing her form the Autaugaville post.

Robinson filed a motion for reconsideratioin arguing that the agreement used the term "reassigned" in ways that indicated that an employee is reassigned anytime she changed work stations. She argued that it is not undisputed that Smith initially informed her that he believed hse had no retreat rights and had maintained the same position throghout the proceedings. The district court denied the motion. Robinsoon filed an "Answer" to the court's order. The court deemed this filing as a motion to reconsider and denied it also.

Robinson contends that her termination form the Autaugaville route was improper because the USPS was bound by the acts of its agent, Hand, who had authority to hire her; because she was not terminated for jsut cause as required by the agreement; and because she was not given her due process rights when terminated. She argues that she did have retreat rights because she did not get the route in Texas which she had been promised and was forced to sign up for another post. She further argues that the Union breached its duty of fair representation because she arguable (sic) had retreat rights and their representative Smith admitte3d that he was not 100 percent sure that she had no grievance.

The Union answers that it made a rational interpretation of the agreement language that Robinson did not have retreat rights, and that Robinson

was advised before she requested retreat rights that she did not have these rights since she voluntarily transferred to Texas. The USPS answers that since there was no breach of duty of fair representation, Robinson cannot proceed with her claim against the USPS. The USPS went on to argue Hand's authority to hire postal carriers was limited by the agreement and that Robinson had no entitlement to the Autaugaville position becasue she had no retreat rights.

In a summary judgment motion, the non-moving party bears the burden of coming forward with sufficient evidence of every element that he must prove at the trial. Celotex Corporation v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 2552, 91 L.Ed. 2d 265 (1986). The non-moving party is required to designate specific facts showing that there is a genuine issue for trial. Id.

Suits for violation of contract between the USPS and the Union may be brought pursuant to the Postal Service Act. See 39 U.S.C. 1208. This provision is virtually identical to the Labor Management Relations Act and the cases governing 29 U.S.C. 185 are applicable to 39 U.S.C. 1208. American Postal Workers Union, AFL-CIO v. U.S. Postal Service, 823 F.2d 466, 469 (11th Cir. 1987). In a hybrid suit, one against the employer for breach of the collective bargaining agreement and one against the union for breach of its implied duty of fair representation, the employee must prove not only that the employer breached the agreement, but also that the union violated its duty of fair representation. Proudfoot v. Seafarer's Intern. Union, 779 F.2d 1559 (11th Cir. 1986). In order to establish a breach of the duty of fair rep-

resentation, Robinson must prove that the Union's conduct in not pursuing her grievance was arbitrary, discriminatory, or in bad faith. See Vaca v. Sipes, 386 U.S. 171, 190, 87 S.Ct. 903, 917, 17 L.Ed. 2d 842 (1967). The Union does not breach its duty by rejecting Robinson's interpretation of the agreement. See Bache v. American Telephone and Telegraph, 840 F.2d 283 291 (5th Cir.), cert. denied, 109 S.Ct. 219 (1988).

Robinson disagrees with the Union's interpretation of the agreement. She claims that she had retreat rights because she did not get the specific route she had voluntarily transferred to in Texas, and thus, her transfer was not voluntary. There is no evidence that the Union acted in an arbitrary manner. The Union's representative, Smith, explained to Robinson that he did not think she had a meritorious grievance

because she had originally voluntarily transferred to Texas. The Union's interpretation of the agreement was reasonable and the agreement does not specifically define Robinson's situation as an involuntary transfer. There is no specific evidence that the Union acted in bad faith or in a discrminatory manner. Robinson has also failed to establish any evidence of a breach of contract claim against USPS.

The summary judgments are affirmed.

The Union requests sanctions pursuant to Fed. R. App.P. 38 against Robinson for filing a frivolous appeal. Robinson ahs not responded to this request.

Although we find no merit in the appeal, we do not find it such as would warrant the imposition of sanctions.

AFFIRMED.

TJOFLAT, Chief Judge, FAY and JOHNSON, Circuit Judges.

PER CURIAM:

11th Circuit Court of Appeals

On appeal from the United States District Court for the District of Middle Alabama. ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC. Opinion June 13, 1990, 11th Cir., 198__, ___ F.2d ___). Before: TJOFLAT, Chief Judge, FAY and JOHNSON, Circuit Judges. PER CURIAM: (X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Apellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

No. 89-7782

ENTERED FOR THE COURT:

Peter (?) Fay

Aug. 14, 1990

UNITED STATES CIRCUIT JUDGE

11th Circuit Court of Appeals

JUDGMENT No. 89-7782

This cause came to be heard on the transcript of the record from the United States District court for the Middle District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 34-3;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: June 13, 1990

For the Court: Miquel J. Cortez, Clerk

By: Karleen MCNable (?)

ISSUED AS MANDATE: Aug. 23, 1990

11th Circuit Court of Appeals

Costs:

I hereby swear or affirm that the costs claimed were actually and necessarily incurred or performed in this appeal and that I have served this Bill of Costs on counsel/parties of record.

Date signed: June 20, 1990

Signature: James A. Friedman

Attorney for: U.S. Postmaster General
Anthony M. Frank

Costs are hereby taxed in the amount of $19.80 against Plaintiff-appellant

Miquel J. Cortez, Clerk

Tora (?) Freeman, Deputy Clerk

Issued on: Aug. 23, 1990

District Court (M.D.ALA.N.D.)
88-H-977-N August 24, 1989
ORDER AND MEMORANDUM OPINION

This cause comes before the Court on the motion for summary judgment or alternatively for partial dismissal filed on behalf of defendants Frank and United States Postal Service (collectively referred to as "USPS") on July 17, 1989: the motion on behalf of defendant National Rural Letter Carriers' Association (Union) for summary judgment, filed on July 20, 1989, and plaintiff's motion for sumary judgment, filed on August 7, 1989. Upon consideration of the motions of all parties, the documents submitted in support thereof, and finding no genuine issue of material fact, the Court determines that defendants are entitled to judgment as a matter of law. Therefore, for the reasons set forth below, the Court ORDERS that

defendants' motions for summary judgment be and hereby are GRANTED, and that plaintiff's motion for summary judgment be and hereby is DENIED.

A separate judgment shall be entered in accordance with this Order and Memorandum Opinion.

MEMORANDUM OPINION

Plaintiff brought this action claiming that defendatn USPS breached the collective bargaining agreement entered into with defendant Union by refusing to honor her retreat rights and wrongfully removing her form the position fo rural letter carrier in Autauga County, Alabama. Plaintiff further claims that defendant Union breached its duty of fair representation by refusing to process plaintiff's grievance beyond the first level of the grievance procedure, and that such refusal was made in bad faith by

Union officials.

JURISDICTION AND VENUE

Plaintiff's cause of action arises under the colective bargaining agreement and the Court has jurisdiction under 39 U.S.C. 1208(b). Benue is proper in this district under 39 U.S.C. 1208(d)

STANDARD TO APPLY-SUMMARY JUDGMENT

Under Rule 56(c), the court shall grant summary judgment if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." According to the Supreme Court, "the plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to

establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine dispute as to any material fact,' since a complete failure of proof concerning an essential element of the nomoving party's case necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986); Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987).

FACTS

Plaintiff was employed as a rural letter carrier at the Autaugaville Post Office in Alabama from December 1, 1980, to December 9, 1985, at which time she transferred to the Houston Management Sectional Center (MSC) in Texas. The parties agree that the transfer form her station in Alabama was voluntarily initiated by plaintiff.

However, plaintiff maintains that she was promised a specific route in Texas, was denied the route when she arrived although the route was vacant, was assigned to a different route, and therefore her assignment of a Texas route was involuntary.

In March, 1988, plaintiff took annual leave from her post in Texas and came to Alabama to investigate a possible opening in the Autaugaville Post Office. Robinson depo. at 129-130. Plaintiff had attempted on several prior occasions to effect a voluntary transfer back to the Autaugaville area, but had been unsuccessful. On Fedbruary 25, 1988, plaintiff called Steve Smith, Director of Labor Relations for the Union to inquire whether she could exercise "retreat rights" to Alabama under the collective bargaining agreement. Mr. Smith informed her that he

did not think she had any retreat rights under the agreement. Robinson Depo., Def. Ex. 29; Smith depo. at 46-50.

On March 23, 1988, upon being informed that the Autaugaville position was available, plaintiff applied for the position by purporting to exercise "retreat rights" under the collective bargaining agreement. Hand depo., Def. Ex. 3. Mr. Hand accepted plaintiff's application and requested that the local MSC issue a form 50 (personnel action form) to reflect plaintiff's new assignment. Hand depo., Def. Ex. 4.

Upon receipt of Mr. Hand's request for the form 50, Paula Steadham and R.B. Geohagen, MSC Directors, called a meeting on March 28, 1988, with Mr. Hand and informed him that plaintiff had no retreat rights under the collective bargaining agreement and that Mr. Hand was in violation of the agreement. They

directed him to discontinue plaintiff's employment at the Autaugaville Post Office, Hand depo., Def. Ex. 5, which he did that same day. Hand depo., Def. Ex. 7.

Article 12 of the collective bargaining agreement provides the governing principles of seniority, posting, and reassignment under the agreement. Article 12.4-D specifically sets forth retreat rights and states:

> 1. A reassigned rural carrier may exercise retreat rights when a vacancy occurs at the original office or in any office to which territory from the original office was transferred...
>
> 2. A rural carrier who was involuntarily reassigned to another craft in the carrier's office, for any reason, must be returned to the first rural carrier bacancy which occurs at that post office....
>
> 3....

Article 12.4-A defines "reassignment", which include transfer of excess employees, conversion to city delivery, and

consolidation of routes. Under the written terms of the agreement, the term "reassignment" does nto include voluntary transfers. Def. USPS Memo., Ex. C.

On April 6, 1988, plaintiff filed a Step 1 grievance with Mr. Hand regarding her discontinuance from the Autaugaville Post Office and requested that her "retreat rights" be honored. Hand depo., Def. Ex. 8. Mr. Hand refused to sustain the grievance. Hand depo., Def. Ex. 9. The Union did not pursue the grievance any further. Steadham aff. at 6-7.

On April 8, 1988, plaintiff was notified by the Post Mistress on her Texas route that she was to report back for duty in Texas on April 15, 1988. Robinson depo., Def. Ex. 5-4. Plaintiff failed to report back as scheduled, and the Houston Division

sent her a notice of removal for being AWOL on May 3, 1988, with removal effective June 10, 1988. Robinson depo., Def. Ex. 5-5. Plaintiff filed a grievance concerning her removal from the Texas post on May 24, 1988. Def. Union Memo., Ex. 3. Defendant Union processed the grievance through Step 3D, at which point the Union worked out an agreement with the USPS that plaintiff's removal notice of May 3, 1988, would be cancelled if plaintiff agreed to return to her Texas station by September 9, 1988. Robinson depo., Def. Ex. 5-1. Notice of the settlement was sent to plaintiff on August 13, 1988, but plaintiff declined to report to work in Texas. Robinson Depo., Def. Ex. 12.

DISCUSSION

Plaintiff instituted the present action on September 27, 1988, claiming

that defendant USPS had wrongully terminated[1] her employment at the Autaugaville, Alabama Post Office and that defendant Union violated its duty of fair representation in refusing to process her grievance over her removal beyond the first step of the grievance procedure.

[1]. Plaintiff also asserts a claim for negligent discharge. To the extent that plaintiff seeks to proceed under a common-law negligence theory, the Court finds that such claim is irrelevant to the instant proceedings, since plaintiff premises such a claim on the alleged breach of contract. Such a case is controlled exclusively by federal law. Textile Work-Union v. Lincoln Mills, 353 U.S. 448, 456-457 (1957). Although Lincoln Mills is a case arising under 301 of the Labor Management Relations Act, 29 U.S.C. 185, precedent which applies to 301 cases is controlling in suits brought under 39 U.S.C. 1208(b). Bowen v. United States Postal Ser- 459 U.S. 212 (1983).

Plaintiff moves for summary judgment on the basis that her transfer to Texas was not voluntarily completed, she

had the right to retreat to Alabama, and therefore her removal from the Autaugaville post violated the agreement. She further argues that, even if she didnot have any retreat rights, Post Master Max Hand had the authority to hire her as a postal employee, he actually hired her, and therefore defendant USPS's only recourse was to discipline Mr. Hand for violating the agreement. Plaintiff argues that once she had been hired, defendant USPS could not discharge her because she had committed no action which would be a valid basis for discharge under the terms of the agreement.

Defendant USPS moves for summary judgmetn on the basis that it did not violate the bargaining agreement; that Mr. Hand did not ahve the authority to hire an employee in violation of the

agreement; and that plaintiff's removal from the Autaugaville route was appropriate since she was never legally assigned to such route. Defendant USPS further asserts that plaintiff has failed to establish that defendant Union breached its duty of fair representation, which is a prerequisite to maintaining an action against the USPS for breach of contract.

Defendant Union moves for summary judgment on the basis that it had a good-faith reason for not pursuing plaintiff's grievance of her removal from the Autaugaville Post Office past Step 1 of the procedure in that its officers did not believe that plaintiff had a valid grievance under the terms of the agreement. Furthermore, defendant Union asserts that any allegation of bad faith refusal to process plaintiff's grievance would be inconsistent

with the Union's efforts on her behalf with respect to her grievance filed concerning her removal from her Texas post.

I. Union's duty of fair representation

The Court initially addresses the alleged breach of defendant Union's duty of fair representation since plaintiff must prove a breach of this duty before she can maintain an action for discharge in violation of the collective bargaining agreement against defendant USPS. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 570-571 (1976). In order to establish a breach of the duty of fair representation, plaintiff must prove that the Union's conduct toward her was arbitrary, discriminatory, or in bad faith. Vaca v. Sipes, 386 U.S. 171, 190 (1967).

Although the Court is not entirely

sure as to whether plaintiff claims that defendant Union's actions were arbitrary, discriminatory, or made in bad faith, her major arguments seem to focus on defendant Union's alleged bad faith. Plaintiff, in her "Statement of Facts", presents a convoluted history of her attempts to return to Alabama by voluntary transfers. She includes some allegations regarding actions taken by Union members to block her voluntary transfer to Alabama, but such allegations are unsubstantiated by any evidence. Although proof that the Union had acted to undermine her transfer to Alabama in the past may have lent some credibility to her allegation that the Union acted in bad faith in this particular instance, the

Court doubts whether it would substantially advance the claim of bad faith representation since it is undisputed that Steve Smith initially informed plaintiff that he believed she had no retreat rights to exercise, based his interpretation on the terms of the agreement, and has maintained the same position throughout the proceedings.

Although plaintiff seems to admit that her rights under the agreement were questionable, she argues that Mr. Smith admitted that she could try to exercise retreat rights, which she claims she understood to mean that if she did try, the Union would process her grievance. Plsaintiff's Statement of Facts at 11-12. However, regardless of plaintiff's beliefs, she has produced no cases which hold that a union must process a grievance it believes

lacks merit, or that its refusal to process such a grievance amounts to a breach of its duty of fair representation. Indeed, the state of the law appears to be such that a union is free to "sift out the wholly frivolous grievances which would only clog the grievance process," Humphrey v. Moore, 375 U.S. 335, 349 (1964), as long s the union's determination of the merits is made in good faith. AS plaintiff has failed to produce any evidence which would indicate that defendant Union's interpretation of her rights under the agreement was made in bad faith, she has failed to establish an essential element of her claim, and therefore summary judgment is due to be entered in favor of defendant Union.

II. Plaintiff's retreat rights under the agreement:

Although the Court's decision that

plaintiff has failed to meet her burden of proof regarding her claim against defendant Union, and as such, defendant USPS is entitled to judgment as a matter of alw, see Hines, supra, the Court addresses plaintiff's contract claims to explain to plaintiff, who is proceeding pro se, why she would not be able to prevail on her breach of contract claims even if she were not recluded from asserting such claims.

Plaintiff bases her breach of contract claim on the assertion that she had the right to retreat from Texas to Alabama under the provisions of the collective bargaining agreement. Plaintiff maintains that, although she voluntarily left Alabama, she was involuntarily assigned to a route in Texas. Therefore, she reasons, her transfer was not "voluntary" within the meaning of the agreement.

The Court finds that, although

plaintiff's argument is certainly ingenious, it finds no support in the written terms of teh agreement itself. Article 12.4-D.1. of the agreement provides that a reassigned rural carrier may exercise retreat rights. "Reassignment" is defined under part 4-C of Article 12, and does not include situations analogous to plaintiff's "involuntary transfer." Even taking plaintiff's version of the facts as true, she was never "reassigned" from Alabama to any Texas station, as that term is defined in the agreement. Indeed, she was not even "reassigned" from a Texsa station to a second Texas station, since she had never been granted the Texas post which she first sought. Since only those employees who were "reassigned" may exercise retreat rights, and since plaintiff was not "reassigned",

plaintiff had no retreat rights to exercise under the terms of the agreement.

Plaintiff alternatively argues that since Postmaster Hand actually hired her, her summary removal from the Autaugaville route violated the terms of the agreement. However, th Court finds that plaintiff's argument does not ocmport with the applicable law. It is well settled that "anyone entering into an arrangemetn with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384 (1947). Although the parties agree that Mr. Hand had the authority to hire mail carriers, such authority was limited by the terms of the agreement. Mr.

Hand could not act outside the terms of the agreement and thereby bind the United States. See,Merrill, supra. Therefore, plaintiff cannot claim to ahve been validly hired if such action was not within the terms and conditions of the collective bargaining agreement. Since the Court has already determined that plaintiff could not be hired for the Autaugaville post under retreat rights, defendant USPS did not violate the agreement by summarily removing her form that post.

CONCLUSION

Having found no breach of defendant Union's duty of fair representation, and further having found no breach of teh collective bargaining agreement by defendant USPS, the Court concludes that defendant's motions for summary judgment are due to be granted; plaintiff's motion for

summary judgment is due to be denied; and judgment is due to be entered against plaintiff adn in favor of defendants.

DONE this 24th day of August, 1989.

Truman Hobbs

United States District Judge

Filed September 22, 1989
No. 88-H-977-N

ORDER

This cause comes before the Court on plaintiff's motion for reconsideration of denial of plaintiff's motion for summary judgment, filed September 5, 1989, which this Court interprets as a motion to alter or amend the judgment pursuant to Rule 59(e), Federal Rules of Civil Procedure. For the reasons stated below, the Court DENIES plaintiff's motion.

Plaintiff asserts that the Court erred in two respects when it entered

judgment for defendants and against plaintiff. First, plaintiff argues that the grammatical construction of Article 12.4.D does not indicate that the collective bargaining agreement uses the term "reassigned" only as that term is defined in Article 12.4 A, but uses it in a way which would indicate that a rural postal employee is "reassigned" any time he or she changes work stations or crafts.

Although the Court concedes that plaintiff's grammatical construction of Article 12.4.D. is correct, in that nothing in that section specifically refers to Article 12.4.A of the agreement, plaintiff herself points out that Article 12.2.C.4 specifically denies retreat rights to a rural carrier who "voluntarily transfers ... as the result of applying for a rural carrier vacancy

...." Plaintiff argues that this provision restricting the availability of retreat rights does not apply to her because the result of applying for a vacancy must be voluntary, not the application itself.

The Court finds nothing in the direct language of the agreement which would compel the result that plaintiff seeks. Indeed, plaintiff's construction at most creates the possibility that the language of the agreement is ambiguous as applied to her situation. Howver, the parties to the agreement, that is the United States Postal Service and the Union, both interpret this clause to mean that by voluntarily applying for a transfer, plaintiff did not obtain retreat rights. Plaintiff has produced no evidence which would raise an inference that such clause has

ever been given a contrary meaning, or that the Union chose to give it such a meaning for any improper motive.

Second, plaintiff maintains that, "It is not 'undisputed that Steve Smith initially informed plaintiff that he believed she had no retreat rights to exercise, based on his interpretation of the agreement, and has maintained the same position throughout the proceedings.'" Plaintiff's motion at 6 (emphasis in original). However, there in (sic) nothing in plaintiff's motion or its attachments which raises a genuine dispute as to that finding.

Having found nothing in plaintiff's motion or additional evidentiary submissions which would compel the Court to alter its judgment, the Court denies plaintiff's motion.

DONE and ORDERED this 22nd day of September, 1989.

Truman Hobbs

United States District Judge

NLRB CLAIM NO. Case 10-CB-5202(P)

National Rural Letter Carriers' Association

Case 10-CA-23502

United States Postal Service

-August 29, 1988-

letters sent to the following:

Dear Mr. Smith (NRLCA) and

a letter sent to

Dear Mr. Pigford: identical:

This is to advise that the charge in the above referenced case has been withdrawn with my approval.

Very truly yours,

Martin M. Arlook
Regional Director

Plaintiff's explanation:

NLRB agent, Ed Smith, new employee, studying for bar exam, took affidavit (NLRB refuses to give plaintiff a copy). NLRB agent Smith told plaintiff that

the NLRB has approximately 45 days in which to complete investigation and bring a charge. He said that the 45 days had expired, since the claim was filed on or near 6/18/88, and the Post Office and Union would claim that the NLRB had treated them improperly in not bringing the claim within the 45 days. Therefore, if plaintiff would withdraw the claim, and reapply, the NLRB would take action against the parties and get her reinstated, etc. Plaintiff withdrew the claim. The NLRB claimed that the two documents (a letter from Paula Steadham dated 1/22/88 and a letter from Steadham dated 2/25/88) were now outside the 6 months in which plaintiff could charge. Therefore, the 3/28/88 discharge at Autaugaville, Alabama could be termed nonretaliatory.

NLRB CLAIM NO. Case NO. 10CA-23663(P)
United States Postal Service
Case No. 10-CB-5258(P)
National Rural Letter Carriers' Association (Union)

disposition letter to plaintiff:

Dear Mrs. Robinson: Nov. 16, 1988

The above-referenced cases, charging violations under Section 8 of the National Labor Relations Act, as amended, have been carefully investigated and considered. As a result of the investigation, it does not appear that further proceedings are warranted on either matter.

With respect to the charge against the Postal Service, there is insufficient evidence to conclude that the termination of your employment by the Postal Service resulted from your protected activity. The Postal Service issue4 a letter on January 22, 1988, informing

you that it was not in its best interest to allow you a reassignment to the Montgomery Sectional Center. This was the subject of a charge in Case 15-CA-10509(P), and the dismissal of that charge has been sustained by the General Counsel through the Office of Appeals. Your new evidence consists of the fact that you then approached Max Hand, Postmaster of the Autaugaville Post Office, and applied for and received a position there by telling Hand you were utilizing the "Retreat Rights" section of the collective bargaining agreement. The Employer and the Union agree that that section of the contract was inapplicable in your case. Further, Hand, according to his superiors, acted outside the

scope of his authority in hiring you and, in addition to being instructed to cease allowing you to work, was issued a letter or (sic) warning. Despite the Statement of the Equal Employment Opportunity Counselor that one reason you were not given the opportunity to return to Alabama was because you were under litigation at that time, the retreat rights section of the collective bargaining agreement reveals nothing inconsistent with the application of that section by the Postal Service and Union. The claim by the Postal Service that you would not under any circumstances have been eligible for the position can not be overcome. I am, therefore, refusing to issue complaint with re-

spect to this charge.

As to your charge against the Union, you[5] assert that the Union breached its duty of fair representation when it provided assistance to another employee who desired to return to Alabama while it did not provide such assistance to you. It is not a violation of the Act for the Union to provide such assistance. In your case, however, such assistance was not warranted. The Union's assistance to another employee came after the Postal Service approached the Union and gave assurance that the employee's return would cause no other employee to be disenfranchised. There is no provision in the contract which the Union could use unilaterally to force the Postal Service to accept your re-

turn. As to the allegation that the Union refused to process your grievance in Alabama for arbitrary, invidious, and discriminatory reasons, it appears that the Union informed you of its interpretation of the contract that you could not exercise retreat rights in returning to Alabama. You chose to leave your position in Texas and go the (sic) the Autaugaville Postmaster directly, notwithstanding that advice, and were subsequently discharged. The Union then took the position that it could not process a grievance which clearly had no merit. Notwithstanding the statement by a Union representative that your previous Labor Board charges were trouble, the Union has ocntinued to represent you by requesting pay for the time worked in Alabama and by getting the

Postal Service to allow you to return to your job in Texas which you abandoned. Because the foregoing does not rise to a breach of duty of fair representation under Board criteria, I am refusing to issue complaint with respect to this charge. Form NLRB-4938, Procedures for Filing an Appeal, is attached. The appeal period expires at the close of business on November 30, 1988.

Very truly yours.

Martin M. Arlook
Regional Director

DEPARTMENT OF LABOR, WAGE
AND HOUR DIVISION

July 26, 1988

MEMORANDUM TO: ARA Richard D. Robinette,
ATTN: Carrie Riddle
ATlanta WH/RO

FROM: FOS Daniel W. Bremer
Montgomery WH/AO

SUBJECT: FOIA - U. S. Postal Service
Ms. Edith Robinson
Prattville, Al

Ms. Robinson has asked for our case file on her complaint. We simply attempted a conciliation and received an agreement to pay The only paperwork is her complaint and the WH-51. These are forwarded for your reply under the FOI. Thank you.
Enclosures (3)

Plaintiff-appellant's Explanation: Robinson's pay for working 5 days (3/23/88 - 3/28/88) was secured through this charge, but the Union later

took credit for securing the pay. The grievance at Autaugaville was never taken past Step 1, yet the Union mysteriously secured Robinson's pay some four months later, in 7/88. A pay adjustment card with a June 3, 1988 date was signed by Robinson's former Texas postmaster, McLean, even though the grievance had been filed in Alabama. McLean changed the annual leave days to "0", for "other" pay, because the Postal Service could not subtract annual leave days from Robinson's balance while she had been working. That would mean that the Postal Service was paying her "double," once for actual work, and once for paid annual leave, which is never done. To put it another way, if an employee works and annual leave is subtracted, the employee loses the 'day-off-with-pay' that could be used at a later date. The Postal Service, on unemployment award appeal, claimed that

Robinson had been on annual leave, and was paid annual leave for working in Alabama, and was not paid for the Alabama work.

TEXAS EMPLOYMENT COMMISSION

Appeal No.: 88 4728 2 0189 Feb.3,1989

CASE HISTORY: By a determination dated December 8, 1988, the claimant was disqualified under Section 5(a) of the Texas Unemployment Compensation Act beginning July 17, 1988, and continuing until the claimant returns to employment and either works for six weeks or earns wages at least equal to six times the claimant's weekly benefit amount because the claimant left the last work voluntarily without good cause connected with the work. The claimant appealed.

FINDINGS OF FACT: Prior to filing an initial claim dated July 17, 1988, the claimant was employed from January

26, 1980. through March 28, 1988, as a rural letter carrier. The number of hours worked by the claimant each week varied and the claimant was paid an ending annual wage of $32,509.00. The working agreement between the employer and the claimant's representing union provides for transfers. The agreement provides that acceptance of a request for a voluntary transfer is at the discretion of the installations heads involved and that denial of such a request shall not be considered a grievable matter under the agreement.

A request for voluntary reassignment must be submitted in writing to the installation head of the office to which the regular rural carrier desures reassignment.

The agreement provides for the request for transfer to be initiated in writing and that while acceptance is up to management, such request must not be

unreasonably denied. If the request is denied, it must be based on reasonable causes.

Reasonable causes may include a history of poor performance, recent disciplinary action, excessive absenteeism, or local employment conditions. The working agreement stipulates that there may be other justified causes for denial.

Further, the working agreement states that managers must grant the transfer when appropriate, or give reasons in instances where the request is denied. When an employee's request for reassignment has been granted, the installation head will contact the employee's current installation head to arrange for a mutually agreeable reassignment and reporting date.

The claimant was assigned to work out of the Fresno, Texas, post office. On March 21, 1988, the claimant requested

indefinite personal leave. The claimant's postmaster granted the claimant's request. The claimant was taking leave to arrange a transfer to a work location in Alabama. The claimant reported to the work location in Alabama and began working there on March 23, 1988, with the permission of the local postmaster. The postmsster lcoated in Alabama had initiated steps to have the claimant transferred under his jurisdiction. In the meantime, the postmaster in Alabama was advised that the claimant couldnot be transferred because the opening that he was filling with the claimant had not been posted for bid. Also, the psotmaster was advised that no reassignment or transfer had been initiated from the claimant's previous work location.

At about this time, the Montgomery, Alabama, management sectional center,

under whose jurisdiction the claimant was now working, contacted the postmaster in Alabama and instructed him to discharge the claimant. The Alabama postmaster complied with the instructions and dismissed the claimant. The claimant worked at the Alabama work location through March 28, 1988. On March 31, 1988, the postmaster for whom the claimant worked in Texas talked with the claimant by phone and the claimant informed her that she was not returning to Texas, but was going to stay in Alabama and fight for her job.

On April 5, 1988, the Texas postmaster mailed the claimant necessary forms to begin processing the claimant's removal form the postal service.

On April 8, 1988, the Texas postmaster mailed the claimant a letter instructing her to report back to her duty station in Texas by April 15, 1988, and advising that appropriate discipli-

nary action would be forthcoming should she not report as instructed. ON May 3, 1988, the claimant was mailed a letter by her Texas postmaster advising her that she was being carried as AWOL from her position since April 15, 1988. The claimant did not return to her position in Texas and was relieved of duties effective June 10, 1988. The claimant filed an initial claim for benefits dated July 17, 1988. The claimant filed a grievance to her dismissal and it was agreed by the employer and the claimant's representing union that the claimant could return to her assigned route at Fresno, Texas, by September 9, 1988, or would be considered removed from service as of June 10, 1988. When the claimant was relieved of her duties at her Alabama work station, the postmaster at that facility gave the claimant

written notice that she was being relieved of duties as of March 28, 1988, and that her dismissal was at the instructions of upper management in the management sectional center.

CONCLUSION: Section 5(a) of the Texas Unemployment Compensation Act provides, in part, that an individual who has been found by the Commission to have left his last work voluntarily without good cause connected with his work shall be disqualified until the claimant has returned to employment and either worked for six weeks or earned wages equal to six times his weekly benefit amount unless the individual left his work to move with a spouse from the area in which the individual worked. In that case, the claimant shall be disqualified

for not less than six nor more than twenty-five weeks following the filing of a valid claim, as determined by the Commission according to the circumstances in each case.

Good cause connected with the work for leaving, as that term is used in the law of unemployment insurance, means such cause, related to the work, as would induce a person who is genuinely interested in retainin g work, to, nevertheless, leave the job.

Section 5(b) of the Texas Unemployment Compensation Act provides, in part, that an individual who has been found by the Commission to have been discharged for misconduct connected with his last work shall be disqualified until the claimant has returned to employment adn either worked for six weeks or earned wages equal to six times his weekly benefit amount.

Section 19(Q) of the Texas Unemployment Compensation Act provides:

"Misconduct" means management of a position of employment by action or inaction, neglect that places in jeopardy the lives or property of others, intentional wrongdoing or malfeasance, intnetional violation of a law, or violation of a policy or urle adopted to ensure orderly wrok adn the safety of employees, but does not include an act of misconduct that is in response to an unconscionable act of an employer or superior.

The testimony presented at this hearing is in conflict.

This tribunal finds the following facts to be present.

The claimant initiated a transfer to a new duty station in accordance with the working agreement between the employer and the claimant's representing

union. The postmaster at the facility where the claimant worked was acting as the employer's agent by accepting the claimant for work at that facility and the claimant was immediately placed on duty and performed work at the gaining facility for approximately five days.

At the time the claimant was relieved of duties at the newly transferred-to facility, the claimant was not given any reason that would establish reasonable cause for the denial of the transfer request; instead, the claimant was only advised that her dismissal (or removal from service) was at the instruction of supervisory personnel in that management sectional center.

In Appeal No. 273-CA-77 (MC 135.45), the Commission held that a claimant was actually terminated at the time

the claimant was placed on suspension as the claimant ceased performing services or receiving wages and was, therefore, unemployed.

Therefore, this Tribunal concludes that the actual job separation occurred when the claimant was relieved of her duties at the facility where she last performed work as the claimant did not perform work for, or receive wages from, the employer after that date.

Whenever an individual quits a job, he bears the burden of proving that he had good cause connected with the work to justify leaving the job. Conversely, whenefer an employer discharges an individual, the employer bears the burden of proving that the dismissal was the direct result of misconduct connected with the work on the claimant's part.

Since the employer didnot provide the claimant a reason for being relieved of her duties, as required by the working agreement, this Tribunal concludes that the claimant was discharged for reasons other than misconduct connect with the work.

The claimant then is not subject to disqualification form benefits.

The determination dated December 8, 1988, disqualifying the claimant from benefits beginning July 17, 1988, will be reversed. However, since the job separation was initiated by the employer, at the time the claimant was relieved of duties, this decision will be rendered under Section 5(b) of the Act, rather than 5(a).

DECISION: The determination dated December 8, 1988, disqualifying the claimant beginning July 17, 1988, under Section 5(a) of the Act, is

reversed under Section 5(b) of the Act.

Randall Mardis

Hearing Officer

U.S. Postal Service
Routing Slip (FORM 13)

to: Ms. Paula Steadham
Director, Human Resources
Montgomery, Al. 36119-9994

From: P.A. Syal
Manager, Labor Relations

(Houston, Tx.)

Date: February 15, 1989

RE: Robinson, E. N.
SS # 419-62-4537

Attached find copies of our EEO and grievance files along with the Texas Employment Commission Appeal Tribunal decision which we have appealed as a lack of jurisdiction as "the facility where she last performed work" was Alabama.

(quotation marks in original)

Also is copy of latest NLRB. I am unsure of status of her law suit aat this time.

TEXAS EMPLOYMENT COMMISSION

Commission Appeal Number:
88 01844 20 020889

Appeal Tribunal Number:
88 04728 2 0189

Social Security Number:
419-62-4537

Appeal Tribunal Decision Dated:
February 3, 1989

Appeal Filed by: Employer

CASE HISTORY: The initial claim was approved for the payment pof unemployment compensation benefits; however, the claimant was disqualified from the receipt of benefits because it was determined that the claimant left the last work voluntarily without good cause connected with the work. The claimant appealed and the Appeal Tribunal reversed under Section 5 (b) of the Act.

The employer has appealed to the Commission.

FINDINGS OF FACT: Prior to filing an initial claim for benefits with an effective date of July 17, 1988, the claimant last worked for this employer from January 26, 1980, through March 28, 1988, as a letter carrier.

The claimant was separated from this employer when she refused to return to work from paid annual leave.

The claimant worked for the employer, the U.S.Postal Service in Fresno, Texas. On March 21, 1988, the claimant requested and was granted annual paid leave to visit Alabama. While in Alabama, claimant requested a transfer to a postal office in Alabama. Although the claimant was still receiving paid leave from the Texas Postmaster, the Alabama office allowed the claimant to work there for

approximately five days while the request for transfer was pending. The request was ultimately denied for procedural reasons. The Texas Postmaster held the claimant's job open for several months thereafter, but the claimant refused to return to work there, stating that she planned to remain in Alabama to fight for a position there.

CONCLUSIONS: Section 5(b) of the Texas Unemployment Compensation Act provides, in part, that an individual who has been found by the Commission to have been discharged for misconduct connected with his last work shall be disqualified until the claimant has returned to employment and either worked for six weeks or earned wages equal to six times his weekly benefit amount.

Section 5(a) of the Texas Unemployment Compensation Act provides that an individual who has been found by the Commission to have left his last work voluntarily without good cause connected with his work shall be disqualified until the claimant has returned to employment and either worked for six weeks or earned wages equal to six times his weekly benefit amount, unless the individual left work to move with a spouse from the area in which the individual worked. In that case, the claimant shall be disqualified for not less than six nor more than twenty-five weeks following the filing of a valid claim, as determined by the Commission according to the circumstances in each case, provided no claimant shall be disqualified because of his or her leav-

ing due to medically verified illness, injury, disability, or pregnancy and is still available for work. Military personnel who do not reenlist may not be considered to have left work voluntarily without good casue connected with work.

The Commission does not agree with the Appeal Tribunal's conclusion that the claimant was discharged for reasons other than misconduct connected with the work. Rather, the Commission concludes that since the claimant was still officially employed by, and receiving wages from, the Texas Postmaster when she worked in Alabama, the claimant was not separated form the Texas Postmaster at that time. Her separation occurred when she subsequently refused to return to work from paid leave at the

Texas office.

The claimant's refusal to return to work constitutes a voluntary quit and the issue becomes whether the claimant had good cause for quitting her job. The Appeals Policy and Precedent Manual defines good cause as such casue as would induce an individual who is genuinely interested in retaining her position of employment to nonetheless leave the job. The Commission finds that the claimant has not established such cause for quitting. Consequently, we will reverse the Appeal Tribunal decision by disqualifying the claimant from the receipt of benefits under Section 5(a) of the Act.

DECISION: The Appeal Tribunal decision, which awarded the claimant benefits without disqualification under Section 5(b) of the Act, is

reversed. The claimant is hereby disqualified from the receipt of benefits under Section 5(a) of the Act beginning on July 17, 1988, the effective date of the initial claim for benefits.

The claimant is advised that an overpayment of unemployment compensation benefits, which the claimant will be required to refund to the Commission, will result if benefits were received during the period of disqualification established by this decision.

Date Mailed April 6, 1989

James J. Kaster
Chairman

Mary Scott Nabors
Commissioner Representing
Employers

Charles E. Haddock
Commissioner Representing
Labor

TEXAS EMPLOYMENT COMMISSION

Commission Appeal Number:

MR 88 04412 20 041589

Appeal Tribunal Number:

88 04728 2 0189

Social Security Number:

419-62-4537

Appeal Tribunal Decision

February 3, 1989

Appeal Filed by: Claimant

On March 6, 1989, the Commission rendered a decision in this case reversing the Appeal Tribunal. On April 15, 1989, the claimant filed a timely motion for rehearing in accordance with the provisions of Section 6(h) of the Texas Unemployment Commission Act. The Commission has considered the motion for rehearig and is of the opinion that its decision rendered on April 6, 1989, was proper. Accordingly, a

rehearing is denied.

The claimant was notified by a Notice of Claim Determination on or about April 11, 1989, of an overpayment of unemployment compensation benefits in the amount of $5,040.00 which the claimant was liable to refund to the Commission under the terms of Seciton 6(b) of the Act. Under the terms of Section 6(e) of the Act, the Commission hereby removes jurisdiction of the overpayment determination to itself. As the Commission decision which created the overpayment has been left in full force and effect, the overpayment determination will be affirmed.

The claimant's motion for rehearing dated April 15, 1989, is denied.

The Notice of Claim Determination mailed to the claimant on April 11, 1989, ruling that the claimant had

been overpaid $5,040.00 in unemployment compensation benefits which the claimant is required to refund to the Commission under Section 6(b) of the Act, is affirmed.

Date Mailed May 19, 1989.

James J. Kaster
Chairman

Mary Scott Nabors
Commissioer Representing Employer

Charles E. Haddock
Commissioner Representing Labor

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Houston District Office
Houston, Tx. 77002

Docket No. 330-88X-0021

Agency No. 3-V-0603-87

Edith N. Robinson , complainant
and
U.S.Postal Service, respondent

March 28, 1989

RECOMMENDED DECISION

INTRODUCTION

On February 2, 1988, the hearing was held on the complaint of Edith N. Robinson, hereinafter referred to as the Complainant, that she was discriminated against because of her sex (female) and by reason of reprisal, by the United States Postal Service, hereinafter referred to as the Agency, when she was not allowed to transfer from her position as a rural letter carrier in Freeport, Texas to the same position in a rural Alabama post

office.

Ten witnesses, including the Complainant, testified at the eharing. Six exhibits were accepted into evidence.

BACKGROUND

The Compainant, a rural letter carrier at the Agency, exhausted all AGency remedies prerequisite to trigger her hearing right. Subsequent to filing an informal complaint of discrimination on April 9, 1987, she was dissatisfied with the EEO Counselor's attempted resolution of the matter. Thereafter, on June 2, 1987, the Complainant filed a formal complaint of discrimination which was investigated between July 8, and July 9, 1987. After an unsuccessful attempt to adjust the formal complaint, the Agency issued a Proposed Disposition on October 6, 1987, finding no discrimination.

The Complainant, finding the Proposed Disposition unacceptable, on October 23, 1987, requested a hearing. By letter dated October 28, 1987, the Agency requested an Administrative Judge from the EEOC to conduct a hearing on the complaint.

ISSUE

Was the Complainant discriminated against because of her sex (female) and because of reprisal for previous EEO complaints when she was in March 1987, denied a transfer from Freeport, Texas to a rural carrier's position in Alabama?

ANALYSIS AND FINDINGS

Jurisdiction to decide upon Section 717 of Title VII of the Civil Rights Act of 1972, 42 USC Section 2000e-16. Regulation Authorizing hearing procedures, initially granted to and promulgated by the Civil Service Commission at 5 C.F.R. 713, and as

adopted with technical amendments by the Equal Employment Opportunity Commission now appear at 29 C.F.R. 1613. 218(g).

The proof needed toestablish prohibitive discrimination depends upon the facts of each case and upon the concept of the theory of discrimination. Disproportionate impact and disparate treatment are the two hteories that are primarily being used today. Disparate treatment, the theory utilized in the instant case, involves a situation where an individual is treated less favorably because she/he is a member of a different group.

The order and burden of proof in an individual discrimination case under Title VII was set out by the Supreme Court in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). The Complainant must carry the initial burden of establishing a prima facie

case of discrimination. Once the Complainant has met this initial burden, the burden shifts to the Agency to articulate some legitimate, non-discriminatory reason for its action. Texas Department of Community Affairs V. Burdine, 1010 S.Ct 1089 (1981). The ultimate burden rests with the Complainant who must prove that the Agency's stated reasons for its actions was a pretext for a discriminatory decision. McDonnell Douglas, supra. In order to establish a prima facie case of sex discrimination, the Complainant must prove the following:

1. That she was a member of a protected group;
2. That an adverse action was taken against her; and
3. That other similarly situated individuals outside her protected group were afforded more favorable

treatment.

To establish a prima facie case based on reprisal, the Complainant must establish that:

1. She engaged in protected activity;

2. The Agency was aware of her participation in a protected activity;

3. She was subject to an adverse action; and

4. The Agency's adverse employment decision followed the Complainant's protected activity within such a period of time that one can infer retaliatory motivation. Hochstadt v. Worcester Foundation for Experi-Biology, 425 F. Supp. (D. Mass. 1976), aff'd 545 F.2d 222 (1st Cir. 1976).

At all times pertinent to this matter the Complainant was a rural letter carrier, R-8, in Freeport, Texas. The Complainant started her career with the Agency at the Elmmore,

Alabama Post Office. H.T. 12. In about December 1985, the Complainant applied for a transfer to Houston, Texas. After serving a short time as a rural carrier at Fairbanks Station in Houston, the Complainant sought and was granted a transfer to Freeport, Texas. H.T. 14. The Complainant testified that she was subjected to a pattern of harsh treatment by her supervisor, Mr. Charles McPhail, Superintendent of Postal Operations at Freeport. She blames this treatment upon the fact that she has filed prior complaints of discriminaiton. See Investigative Exhibits 13A and 13B, H.T. 30-34. The Complainant decided in or about January 1987 to apply for a transfer to her old duty statioin in Alabama, H.T. 35. The Complainant testified that she applied to two local Alabama post offices; Weumpka and Planters

ville. She testified that the only reason she was given for not being permitted to transfer back was that she was a "troublemaker." The Complainant further testified that she made attempts to contact the Postal MSC (Mail Sectional Center) in Montgomery, Alabama to see why she was not being allowed to transfer. She spoke on a number of occasions to Paula Steadham, the personnel directer, at Montgomery. The Complainant testified that "(Ms. Steadham) does have feeling of animosity toward me because she had to go through that EEO questioning and also I filed a charge with the Labor Board..." H.T. 35.

The Complainant also avers in her complaint of discrimination that the reason she was denied the transfer was because of the contents of her

official personnel folder (OPF) which contained a letter of sick leave restriction, a letter of warning on safety performance and a notice of step deferment. She felt that Mr. McPhail put these documents in her OPF because of reprisal for her previous EEO complaints adn because of her sex. See AFF. A,

CONCLUSION OF LAW

A. Complainant has Establsihed a Prima Facie Case of Sex and Reprisal Discrimination.

I find that the Complainant has established a prima facie cause under McDonnell Douglas by showing that:

1. She is a member of a protected class by virtue of her sex and the fact that she has filed prior complaints of discrimination;

2. that her request to be transferred to Alabama was denied;

3. that such action resulted in her, arguably, being treated less favorably than others outside her protected class or classes.[1]

1. Testimony of Otis G. Taylor, Manager of Station Branch Operation, Montgomery Alabama reveals that the possibility of a transfer to Alabama was quite feasible. Mr. Taylor was detailed to the job of rural route coordinator about the time of the Complainant's request for a transfer. He stated that the Complainant pointed out to him written policy on transfers of rural carriers, which he acknowledged to be legitimate. This policy permitted a transfer of the type the Complainant desired. See H.T. 117-122.

During the course of the hearing I heard testimony from various witnesses that the Complainant was extremely

zealous in ensuring that she was being treated properly with respect to all the terms and conditions of her employment. She expressed this zeal both with respect to postal regulations as well as her rights under Title VII. She took numerous affirmative steps to make sure she was not being treated unfairly because of her sex. See H.T. 25-35. I infer from the testimony of the Complainant;'s co-worker, Ray Owens and Joan Starr, as well as the testimony of Mr. McPhail that the Complainant was indeed viewed as a "troublemaker." I find that she was so viewed, in great part, because of her previous EEO activity. I further find that the Complainant's sex (female) was a motivating and pivotal factor in her not being allowed to transfer to Alabama. I make

this finding in large part based upon the candid and revealing testimony of one of the Complainant's adverse witnesses, Max A. Hand, Postmaster of Autaugaville, Alabama. I give substantial credit to Mr. Hand's testimony because it is clear that he does not realize the import of this statement when he made it. Mr. Hand gave the following testimony in answer to why he did not accept the Complainant's transfer:

"THE WITNESS: Okay. It was during that time of life that my wife went into menopause age, and she was a very jealous person, and I live across the street from the Post Office. Ms. Robinson would come to work some days early, which hard to do right on time because she lived about 15 miles from the Post Office in another town, Prattville, and it was hard for her to hit

it right on the button, but my wife thought she should. Ms. Robinson would come in the back door and sit in the vestibule where the mail was deposited, you know, for me to pick up and bring to the workroom floor. She would sit there until time to go on the clock, and my wife naturally thopught that something was going on. And to avoid this type oif home family trouble, I didn't want her to return."

JUDGE RANDALL: Did you mention that to anybody in Montogmery? I mean ---

THE WITNESS: "Yes, I did." H.T. 142

Mr. Hand goes on to testify that he told the Manager of Delivery and collections in Montogmery, Alabama, Mr. Neal Dingman that he did not want the Complainant to return to his office. H.T. 143

This is patently a sex biased bias. Had the Complainant been male she

would have clearly been accepted back. Title VII protects individuals from such obvious disparity of treatment because they are female. Indeed this type of animus is exactly what the statute was intended to remedy.

Once the Complainant has established a prima facie case the burden shifts to the Agency to demonstrate a valid nondiscriminatory reason for its action.

B. The Agency Failed to Articulate a Legitimate Non-Discriminatory Reason.

The Agency endeavored to prove that the reassignment or transfer of rural carriers was within the ralm of management's prerogative, and was done in a nondiscriminatory manner in accordance with pre-establsihed standards and guidelines.

I do not find the testimony of Charles McPhail to have been credible when he stated that the Complainant's restricted

sick leave letter and the letter of warning were placed in her OPF in accordance with Postal policy. While Postal regulations do provide that Step deferments go in the OPF, there has been absolutely no evidence presented to me that any postal regulation or guideline requires placing letters of warning or restricted leave letters in an employee's OPF. I infer that this wasdone in retaliation for her past participation in protected EEO activity. See Hochstadt v. Worcester, supra.

Moreover, I find that the Agency has proffered absolutely no evidence to contradict the direct evidence of sex discriminatory intent presented by Mr. Hand's testimony.

C. Pretext Shown

I, moreoever, find that the Complainant has shown that the reasons given

by the Agency for not allowing her to transfer was a pretext to mask unlawful discrimination. [2]

[2] I note that the Complainant alleged in her formal complaint that she was denied the transfer solely because of the actions of Mr. McPhail. I have uncovered during the hearing a substantial sex based bias that prevented the Complaintant from being transferred. In complaints of discrimination in the Federal Sector the person charged as alleged discriminatory official is always the head of the Agency. In this case, the Postmaster General. Hence it does not make any difference that the true actor in this case was Hand rather than MCPhail. The Complainant was in no position to have been able to determine who made the determinative decision. In any event, I find that McPhail acted with a retaliatory motivation when he placed

the letter of warning and sick leave letter in the Complainant's OPF and that this also constituted discrimination. (end of footnote)

In summary, I find that:

1There was sufficient evidence to establish a prima facie case of sex discrimination.

2 There was sufficient evidence to establish a prima facie case of reprisal discrimination regarding the alleged refusal to allow the Complainant to transfer to Alabama.

3 The Agency failed to articulate a legitimate, nondiscriminatory reason for its action in not allowing the Complainant to transfer to Alabama.

The decision recommended by me is based not only on the evidence presented by the Complainant, but also the evidenc submitted by the Agency

officials and on all other evidence presented during this hearing. During the course of the hearing, I had an opportunity to observe the demeanor of the Complainant and the other witnesses and find them each, for the most part to have been credible, with the exception fo Charles McPhail whom I find to have been vague, evasive, non-responsive and contradictory in connection with his supervision of the Complainant.

RECOMMENDED DECISION

I recommend a finding of discrimintion based on sex(female) and reprisal for prior EEO activity.

RECOMMENDED CORRECTIVE ACTION

I recommend that the Complainant be retroactively transferred to any rural carrier position in Alabama as of March 1987 together with all back pay and benefits which may have accrued.

I recommend that any interim increases, promotions, etc. be correspondingly adjusted in keeping with my finding herein.

NOTICE OF TIME PERIODS

Pursuant to Section 1613.220(d) of Part 613 of the Equal Employment Opportunity Commission's regulations, the Administrative Judge's recommended decision and the corrective action recommended therein, if any, shall become the final decision binding on the Agency if the Agency has not issued a final decision adopting, rejecting, or modifying the recommended decision within 60 calendar days of the date the Agency received the recommended decision. In such event, the Agency shall notify the Complainant that pursuant to Section 1613.220(d) of Part 1613 of the Commission's Reg-

ulations the Administrative judge's recommended decision is the Agency's final decision and furnish to the Complainant a copy of the findings, analysis, and recommended decision of the Administrative Judge made pursuant to Section 1613.218(i) along with a copy of the hearing record. The Agency shall also notify the Complainant in writing of his/her right to appeal to the Commission and the time limits applicable thereto and of his/her right to file a civil action as described in Section 1613.281.

Anthony J. Randall
Administrative Judge

March 28, 1989

CERTIFICATE OF SERVICE

I hereby certify that I served a copies of the foregoing PRTITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE ELEVENTH CIRCUIT, VIA First Class, Certified Mail on this 7th day of November, 1990 to each of the following:

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MY COMMISSION EXPIRES MAY 17, 19[illegible]